Supreme Court of the United States

OCTOBER TERM, 1962

No. ~~150~~ # 10 1963

SIMON BOUIE AND TALMADGE J. NEAL, PETITIONERS,

versus

THE CITY OF COLUMBIA, RESPONDENT

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

JOHN W. SHOLENBERGER,
City Attorney,
EDWARD A. HARTER, JR.,
Assistant City Attorney,
Columbia, S. C.,
Attorneys for Respondent.

OF COUNSEL:
DANIEL R. McLEOD,
Attorney General of South Carolina,
Columbia, South Carolina.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

TABLE OF CASES

STATUTES

OTHER AUTHORITIES

Supreme Court of the United States

OCTOBER TERM, 1962

No. 159

SIMON BOUIE AND TALMADGE J. NEAL, PETITIONERS,

versus

THE CITY OF COLUMBIA, RESPONDENT

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT

We adopt as our Statement the summary of the proceedings in the Recorder's Court as given by Mr. Justice Legge for the Supreme Court of South Carolina [239 S. C. 396, 123 S. E. 2d. (521)]:

> "The appellants Simon Bouie and Talmadge J. Neal, Negro college students, were arrested on March 14, 1960, and charged with trespass (Code, 1952, Section 16-386 as amended) and breach of the peace (Code, 1952, Section 15-909). Bouie was also charged with resisting arrest. On March 25, 1960, they were tried before the Recorder of the City of Columbia, without a jury. Both were found guilty of trespass; Bouie guilty also of resisting arrest. Bouie was sentenced to pay a

fine of one hundred ($100.00) dollars, or to imprisonment for thirty (30) days on each charge, twenty-four and 50/100 ($24.50) of each fine being suspended and the prison sentences to run consecutively. Neal was sentenced to pay a fine of one hundred ($100.00) dollars, of which twenty-four and 50/100 ($24.50) was suspended, or to imprisonment for thirty (30) days. On appeal to the Richland County Court the judgment of the Recorder's Court was affirmed by order dated April 28, 1961, from which this appeal comes.

"Eckerd's, one of Columbia's larger drugstores, in addition to selling to the general public drugs, cosmetics and other articles usually sold in drugstores, maintains a luncheonette department. Its policy is not to serve Negroes in that department."

"On March 14, 1960, about noon, the appellants entered this drugstore and sat down in a booth in the luncheonette department for the purpose, according to their testimony, of ordering food and being served. Neal testified that it was his intention to be arrested; Bouie testified that he knew of the store's policy not to serve Negroes in that department, and that it was his purpose also to be arrested 'if it took that'. No employee of the store approached them, and they continued to sit in the booth for some fifteen minutes, each with an open book before him, when the manager of the store came up, in company with a police officer, told them that they would not be served, and twice requested them to leave. Upon their ignoring such request, the police officer asked them to leave, which request brought no result other than the query 'for what' from Bouie. The police officer then told them to leave and that they were under arrest. Thereupon Neal closed his book and got up; Bouie did not, and the officer thereupon caught him by the arm and lifted him out of the seat. Bouie's book being still on the table, he was permitted to get it; and the officer then seized him by the belt and proceeded to march him out of the store. Bouie testified that he made no resistance, but only said to the officer when the latter had hold of his belt,

'That's all right, Sheriff, I'll come on'. The officer testified that Bouie said: 'Don't hold me, I'm not going anywhere', and that after they had proceeded a few steps he started pushing back and said 'Take your hands off me, you don't have to hold me.'"

REASONS FOR DENYING THE WRIT

I

The Petitioners Were Trespassers and Were Subject to Being Ejected or Arrested Without Violating Their Rights Under the Fourteenth Amendment.

This case does not come within the rule of *Garner v. Louisiana*, 368 U. S. 157, 7 L. Ed. (2d) 207, 82 S. Ct. 248. Petitioners were "sit-ins" but they were not arrested for merely sitting or demonstrating. They were arrested only after the owner of the private luncheonette department asked them to leave the premises and they failed or refused to do so. They were trespassers then, if not before, both under common and statutory law and were arrested and convicted as such.

The luncheonette dept. was privately owned, was within a privately owned drugstore in a privately owned building on privately owned ground and was engaged purely in local commerce. The rights and duties of the proprietor were like those of a restaurant not an inn. As stated in *Alpaugh v. Wolverton*, 36 S. E. (2d) 906, 184 Va. 943, "He [the proprietor] is under no common law duty to serve everyone who applies to him. In the absence of statute, he may accept some customers and reject others on purely personal grounds."

Such proprietor violates no constitutional provisions if he makes a choice on the basis of color. *Williams v. Howard Johnson's Restaurant*, 268 F. (2d) 845; *Slack v. Atlantic White Tower System, Inc.*, 284 F. (2d) 746 (1960).

If petitioners had no right to be served, the proprietor could as he did here, ask them to leave and upon their refusal to comply with his request, they became trespassers. This has always been the law in South Carolina.

In *State v. Lazarus*, 1 Mill, Const. (8 S. C. Law) 31, (1817), the South Carolina Constitutional Court said: • • • "the prosecutor having business to transact with him [the defendant], had a right to enter his house and if he remained after having been ordered to depart, might have been put out of the house, the defendant using no more violence than was necessary to accomplish this object, and showing to the satisfaction of the court and judge, that this was his object."

In *Shramek v. Walker*, 152 S. C. 88, 149 S. E. 331 (1929), the Supreme Court of South Carolina quoted the rule as stated above in the *Lazarus case*, then quoted further with approval from 2 R. C. L., 559, as follows:

> "Therefore, while the entry by one person on the premises of another may be lawful, by reason of express or implied invitation to enter, his failure to depart, on the request of the owner, will make him a trespasser and justify the owner in using reasonable force to eject him."

Neither of the above cases involved questions of race.

In addition to becoming trespassers at common law, petitioners also violated Section 16-386 of the Code of Laws of South Carolina, 1952, as amended. The section was apparently first enacted in 1866. In the General Statutes of South Carolina (1882), it read as follows:

> "Sec. 2507. Every entry on the enclosed or unenclosed land of another, after notice from the owner or tenant prohibiting the same shall be a misdemeanor."

An Amendment of 1883 left out the words "the enclosed or unenclosed" and added punishment by fine of not

more than $100.00 or imprisonment of not more than 30 days, **1883 Acts, etc. of South Carolina (18)**, page 43.

An Amendment of 1898 made the posting and publishing of notice conclusive as to those making entry for hunting and fishing. **1898 Acts, etc. of South Carolina (22)**, page 811.

The Amendment of 1954 was tied in with an Amendment to Section 16-355 increasing the penalty for larceny of livestock and as such added the words "where any horse, mule, cow, hog or any livestock is pastured, or any other lands of another", eliminated the requirement for publishing the notice and changed the conclusiveness of notice from the purpose of hunting and fishing to that of trespassing. **1954 Acts, etc. of South Carolina (48)**, page 1705.

The section thus read at the time petitioners were arrested in 1960, as follows:

> "Sec. 16-386. Entry on lands of another after notice prohibiting same. Every entry upon the lands of another where any horse, mule, cow, hog, or any other livestock is pastured, or any other lands of another, after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars, or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry as aforesaid for the purpose of trespassing."

The pertinent language, however, has remained the same for many years: "Every entry upon lands of another * * * after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor. * * *"

The South Carolina Supreme Court made no strained nor novel interpretation in applying the section to petitioners. In Webster's New International Dictionary (Second Edition) "land" as used in "law" is defined as follows:

> "a. Any ground, soil, or earth whatsoever, regarded as the subject of ownership, as meadows, pastures, woods, etc. and everything annexed to it, whether by nature, as trees, water, etc., or by man as buildings, fences, etc., extending indefinitely vertically upwards and downwards.
>
> "b. An interest or estate in land, loosely, any tenement or hereditament."

And the South Carolina Supreme Court simply followed the common law rule as stated in the *Lazarus* and *Walker cases, supra*, in applying the rule that a person may become a trespasser by refusing to leave even though his entry may have been lawful. *City v. Mitchell*, filed Dec. 13 1961, 239 S. C. 376, 123 S. E. (2d) 512.

II

The Decision of the Supreme Court of South Carolina Granted Petitioners All Rights to Freedom of Expression to Which They Were Entitled Under the Fourteenth Amendment to the Constitution of the United States.

There is no question but if a White man or a group of White men had gone into Eckerd's drug store on the day in question, had sat down, expecting service, had been told that they would not be served, and were further asked to leave but refused to do so, that they would have been guilty of violating Sec. 16-386 of the Code of Laws of South Carolina, 1952, as amended.

If Petitioners' argument is understood, however, Petitioners urge that because they were Negroes and the owners of the luncheonette White, their right to protest exceeded their right to be served.

Is the right to protest greater than the right to agree? The Fourteenth Amendment states simply and clearly that no State shall "deny to any person within its jurisdiction the **equal** protection of the laws."

The "freedoms" guaranteed by the Constitution do not give a person a license to stand in a prohibited place to protest where he could not have stood to agree. Rather, the Constitution guarantees that a person standing where he has a right to stand, shall not be **moved** from that place by the State because of his protest, if his protest is within the protection of the Constitution.

As a practical matter, however, Petitioners were permitted to give full range to their protest. As they state on pages 16 and 17 of their Petition for Writ of Certiorari:

> "Petitioners were engaged in the exercise of free expression by means of nonverbal requests for nondiscriminatory lunch counter service which were implicit in their continued remaining at the lunch counter when refused service. The fact that sit-in demonstrations are a form of protest and expression was observed in Mr. Justice Harlan's concurrence in *Garner v. Louisiana, supra*. Petitioners' expression (asking for service) was entirely appropriate to the time and place at which it occurred. Petitioners did not shout, obstruct the conduct of business, or engage in any expression which had that effect. There were no speeches, picket signs, handbills or other forms of expression in the store which were possibly inappropriate to the time and place. Rather petitioners merely expressed themselves by offering to make purchases in a place and at a time set aside for such transactions."

The owner told them that they would not be served and asked them to leave. It was only after they refused to comply with this request that they were arrested.

What more did petitioners want to do to express their protest? Continue to sit? For how long? Who decides when they shall leave?

This was not a street, private or otherwise, as was involved in *Marsh v. Alabama*, 326 U. S. 501, 66 S. Ct. 276, 90 L. Ed. 265, where a person enters and stands as a matter of right but a private luncheonette in local commerce where a person enters and stands (or sits) upon invitation, express or implied, of the owner. The law decides how long a person has the right to remain on a street but the owner decides who shall remain in his store, and how long.

CONCLUSION

In conclusion, it is respectfully submitted that the Supreme Court of South Carolina decided all federal questions of substance in the case in accordance with applicable decisions of this Court and the Petition for Writ of Certiorari should be denied.

All of which is respectfully submitted.

JOHN W. SHOLENBERGER,
City Attorney,
EDWARD A. HARTER, JR.,
Assistant City Attorney,
Columbia, S. C.,
Attorneys for Respondent.

OF COUNSEL:
DANIEL R. McLEOD,
Attorney General of South Carolina,
Columbia, South Carolina.

Columbia, S. C.,
November 27, 1962.